

ORIGINAL

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

OCT 13 1995

In the Matter of

Establishment of Rules and Policies for
the Digital Audio Radio Satellite Service
in the 2310-2360 MHz Frequency Band

)
)
)
)
)

IB Docket No. 95-91
GEN Docket No. 90-357
RM No. 8610

To: The Commission

DOCKET FILE COPY ORIGINAL

REPLY COMMENTS OF PRIMOSPHERE LIMITED PARTNERSHIP

Submitted By

Howard M. Liberman
Robert Ungar

ARTER & HADDEN
1801 K Street, N. W., Suite 400K
Washington, DC 20006
(202) 775-7100

and

Leslie A. Taylor
Guy T. Christiansen

LESLIE TAYLOR ASSOCIATES, INC.
6800 Carlynn Court
Bethesda, MD 20817-4302
(301) 229-9341

October 13, 1995

No. of Copies rec'd
List ABCDE

075

TABLE OF CONTENTS

I.	The Comments In This Proceeding Overwhelmingly Support Prompt Processing of the Four Pending SDARS Applications	4
II.	The Commission Must Proceed with Processing the Four Pending Applications	6
III.	The Commission Cannot Lawfully Utilize Auctions to License SDARS Systems in This Proceeding	12
IV.	Broadcasters Have Failed to Demonstrate That SDARS Will Cause Harm to the Public Interest	13
V.	The Record Evidence Supports Adoption of Minimum Licensing and Service Rules	24
VI.	The Record Evidence Supports Adoption of Minimal Technical Rules	27
VII.	Conclusion	36

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

RECEIVED
OCT 13 1995
FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

In the Matter of)	
)	IB Docket No. 95-91
Establishment of Rules and Policies for)	GEN Docket No. 90-357
the Digital Audio Radio Satellite Service)	RM No. 8610
in the 2310-2360 MHz Frequency Band)	

To: The Commission

REPLY COMMENTS OF
PRIMOSPHERE LIMITED PARTNERSHIP

Primosphere Limited Partnership ("Primosphere"), by its attorneys, hereby respectfully submits its reply comments in response to the Commission's Notice of Proposed Rule Making, FCC 95-229 (released June 15, 1995) ("Notice"), in the above-captioned proceeding. Primosphere submits that the record now is overflowing with factual support for the prompt licensing of the pending SDARS applications. Whereas the proponents of SDARS have submitted hard economic analysis of the probable effect of SDARS on local broadcasting, the NAB and its broadcasting allies have continued to rely on unsupported allegations and mere conjecture in their opposition to SDARS. If the Commission had any doubts about whether the apocalyptic claims of broadcasters were unfounded, these doubts now should be dispelled. The record shows clearly that SDARS will have only a minuscule impact on local broadcasters and that this impact will have virtually no adverse impact on the provision of local terrestrial radio service to the public.

With broadcasters having failed to carry their burden of showing harm to local radio, the Commission should now move on expeditiously to process the four pending SDARS

application and adopt service and technical rules that will allow the American public to realize the tremendous benefits this service has to offer.

Attached hereto as Attachment A is a Statement of Clifford N. Burnstein, a principal of Primosphere. Therein, Mr. Burnstein separately analyzes the NAB's comments in this proceeding.

I. THE COMMENTS IN THIS PROCEEDING OVERWHELMINGLY SUPPORT PROMPT PROCESSING OF THE FOUR PENDING SDARS APPLICATIONS

The record in this proceeding contains strong public support for SDARS coming from a wide variety of sources which refute the form letters from broadcasters and the NAB's comments. There is a noticeable absence of letters from the public supporting the protectionist position taken by terrestrial broadcasters. The strong statements of public opinion is a blunt rebuke of the claims of broadcasters that they are safeguarding the public interest in opposing SDARS.

A broad spectrum of organizations representing ethnic groups, rural Americans, farmers, truckers, the federal government, satellite and other high-tech businesses, educational institutions and organizations, as well as radio interests shut out of the current market, all have stepped forward to voice their support for the prompt licensing of SDARS. Of the two public interest groups submitting comments in this proceeding, neither advocates hobbling or not licensing SDARS. Rather, their concerns focus on ensuring that minorities

have an opportunity to participate in SDARS systems and that SDARS systems will be held to the same public interest standards as broadcasters.¹

The SDARS applicants have demonstrated conclusively that initiation of this new service will benefit the public and will not harm local radio. The Commission should heed the comments of the National Cable Satellite Corporation ("C-Span"), which state:

Rather than further delay or put regulatory handcuffs on this new technology in deference to existing radio broadcasters, the Commission should recognize that the public's interest is well served by favoring competition over protectionism [T]he public will benefit from new programming and services not otherwise available from local radio because of its market or technical limitations.²

And, the Satellite Broadcasting and Communications Association states:

The utilization of satellites for DARS transmission is a highly innovative and practical use of the radio frequency spectrum. It is an idea whose time has come, and it is propitious for the Commission to reject the protectionist arguments which have delayed the implementation of these services. The Commission should expedite the licensing of these services in order to give the public another important choice for receiving radio broadcasts.³

These statements are echoed throughout the record in this proceeding and now provide an ample basis for the Commission to proceed expeditiously to adopt licensing and service rules and process the pending applications. Such action will make this beneficial new communications service available to the public in the shortest possible timeframe.

¹ Comments of the Minority Media and Telecommunications Council at 3-5; Comments of the Media Access Project ("MAP") at 12.

² Comments of the National Cable Satellite Corporation at 1-2.

³ Comments of the Satellite Broadcasting and Communications Association at 3.

II. THE COMMISSION MUST PROCEED WITH PROCESSING THE FOUR PENDING APPLICATIONS.

A. The Comments Provide a Clear Basis for Adherence to the Commission's Long-Standing Cut-off Policies.

The Comments of Primosphere, CD Radio, AMRC and DSBC provide a substantial basis for adherence to the Commission's cut-off policies. Reopening this proceeding would cause additional unnecessary delay in the implementation of SDARS and would harm, not benefit, the public. Moreover, claims that there have been changes in technology that warrant reopening the proceeding to new, more innovative applicants are wholly unsupported by fact. Further, we note that delays have plagued this docket were not the fault of the applicants. In fact, under Section 7(b) of the Communications Act, the Commission was obliged to process Primosphere's application within one year of filing. The Commission should not punish the applicants for delays that were not of the applicants' making.

1. Commission Precedent and Public Policy Require that the Cut-off Not be Reopened.

Comments submitted in this proceeding outline the well-founded and firmly-rooted Commission precedent that requires the Commission to disregard any requests that the cut-off be reopened. As noted by AMRC, the Commission creates and enforces cut-offs strictly in order to promote efficiency in the licensing process.⁴ This is particularly important when dealing with new satellite services where cut-offs "would avoid the possibility of a flood of late-filed applications and the resultant delay in resolution of both spectrum and service questions."⁵ DSBC recognized that the Commission will waive the cut-off requirement only

⁴ Comments of AMRC at 5.

⁵ Id. at 6 (citing LEOSAT Corp., 8 FCC Rcd 668, 670 (1993)).

upon a showing of "unusual or compelling circumstances" that must involve "a calamity of widespread nature that even the best of planning could not have avoided."⁶ CD Radio notes that no such unusual or compelling circumstances exist with regard to the three-year old SDARS cut-off.⁷ Nor, as Primosphere established, can the Commission reopen the proceeding merely to manufacture mutual exclusivity and thus enable auctions.⁸

The Commission has previously licensed satellite providers before all questions of mutual exclusivity have been resolved. In the Big LEO allocation order, the Commission licensed three entities to provide mobile satellite services pursuant to a band sharing plan devised by the applicants.⁹ These licenses were issued despite the Commission's recognition that questions remained as to whether future financial showings by the non-licensed applicants would destroy the sharing plan and create a mutually exclusive situation.¹⁰ The Commission explained that this action was taken in order to speed provision of mobile satellite services to the public, particularly to those in rural areas.¹¹ In the case of SDARS, speeding provision of service to the public is no less important and it is recognized, without dispute, that the present applicants are not mutually exclusive.

2. Comments Suggesting that the Proceeding Should
be Reopened Provide No Legal or Factual Basis

⁶ Comments of DSBC at 43, n.77 (quoting Waivers of Applications Filing Deadlines, 58 R.R.2d 1706 (1985)).

⁷ Comments of CD Radio at 43.

⁸ Comments of Primosphere at 10.

⁹ In the Matter of Amendment of the Commission's Rules to Establish Rules and Policies Pertaining to a Mobile Satellite Service in the 1610-1625.5/2483.5-2500 Mhz Frequency Bands, 9 FCC Rcd 5936 (1994) ("Big LEO Report and Order").

¹⁰ Id. at ¶ 10.

¹¹ Id. at 3.

for Such Action and Must be Rejected.

The NAB and a number of individual broadcasters provide no basis for reopening the cut-off. They argue vaguely that reopening the cut-off would allow a broader pool of applicants with a broader pool of services. In addition, they claim that there have been technical advances that warrant reopening the proceeding. There is no basis for these arguments. No one has suggested that some new technological advance has now made filing an application more desirable than before.

Instead, it is evident that these parties are using these phantom applicants and unspecified technological advances as an obvious protectionist ploy to delay SDARS and the benefits it will bring. There is *no other interest* the NAB and terrestrial broadcasters could be advancing in advocating this stance. Broadcasters have not said that they want to reopen the proceeding because they want to participate in SDARS; they simply want to delay SDARS. Such delay is blatantly contradictory to the interest of the listening public and should not be permitted.

B. Cracker Barrel's Unsupported Allegations Provide No Basis for Reopening the Cut-off.

If there are any entities interested in implementing SDARS systems, presumably they would have filed applications or at least filed comments in this proceeding. Only Cracker Barrel Old Country Store, Inc. — a retail store and restaurant chain operator — has thus far expressed interest. The reasons advanced by Cracker Barrel in support of its position, however, are so deficient that its entire filing must be disregarded.

As an initial matter, Cracker Barrel has provided no explanation of why it did not meet the initial cut-off. Cracker Barrel had the same opportunity as other applicants to participate in the initial proceeding, but chose not to. Moreover, it has failed to provide any

legal basis for granting it a waiver of the cut-off rule. Absent such a showing, a waiver may not be granted.¹² Cracker Barrel's attempt to circumvent this requirement by claiming that reopening the cut-off is necessary to ensure that the Commission has "received all of the best proposals" and the public is assured "all of the best choices of listening" simply misses the mark. Although the Commission does seek to maximize competition and provide the best possible service to the public, these general goals should not be the basis for constantly interrupting licensing proceedings. This is precisely why cut-off rules were adopted and are strictly adhered to for satellite services.¹³

Cracker Barrel also does not present even a minimum showing that it is qualified to be an SDARS licensee. Cracker Barrel owns and operates a chain of restaurants and retail stores. The company has no experience in the satellite or broadcast fields. The sole qualification cited by Cracker Barrel is that it is "expert in identifying and meeting the needs of the travelling public."¹⁴ This can hardly serve as a substitute for substantive satellite or broadcast experience. Cracker Barrel's lack of experience is clearly demonstrated by its "technical showing." As explained below, the technical foundation of Cracker Barrel's approach to SDARS displays a fundamental misunderstanding of satellite communications technology.

Primosphere questions whether Cracker Barrel is proposing a system that is appropriate for the Satellite Digital Audio Radio Service. Cracker Barrel proposes a system

¹² See Waivers of Applications Filing Deadlines, 58 R.R.2d 1706 (1985).

¹³ See LEOSAT Corp., 8 FCC Rcd 668, 670 (1993).

¹⁴ Comments of Cracker Barrel at 3.

that would "place special emphasis on the information aspect of its satellite radio service."¹⁵ It proposes to broadcast traffic and weather conditions as well as guides to lodging, restaurants and stores. Such a data-oriented system is outside the scope of the high-quality music focus that lies at the heart of SDARS. Cracker Barrel's proposal is better suited for the Commission proceedings allocating spectrum for use by the Intelligent Transportation System.¹⁶ In addition, Cracker Barrel's proposal appears to be an attempt to utilize SDARS solely to advertise its own services and merchandise.

The Commission will not be excluding Cracker Barrel from the SDARS process by refusing to reopen the proceeding. Rather, Cracker Barrel could provide its service through leasing channels or purchasing advertising time on other SDARS systems.¹⁷ This alternative seems more appropriate for Cracker Barrel's proposed uses.

III. THE COMMISSION CANNOT LAWFULLY UTILIZE AUCTIONS TO LICENSE SDARS SYSTEMS IN THIS PROCEEDING.

A. The Commission's Auction Authority Requires Mutual Exclusivity.

Section 309(j) of the Communications Act is explicit in the prerequisites that must be met before the Commission may exercise its auction authority. As each of the SDARS applicants and several other commentors have noted, auctions may only be used to license a

¹⁵ Comments of Cracker Barrel at 3.

¹⁶ See In the Matter of Amendment of Parts 2 and 15 of the Commission's Rules to Permit Use of Radio Frequencies Above 40 GHz for New Radio Applications, ET Docket No. 94-124, RM-8308.

¹⁷ The Commission has recognized this as a productive alternative for applicants who are denied licenses in the Fixed Satellite Service. See In the matter of Licensing Space Stations in the Domestic Fixed Satellite Service, 58 R.R.2d 1267 (1985) at para. g.

service when mutually exclusive applications exist.¹⁸ The Joint Comments of the SDARS applicants make clear that the applicants agree that they can each operate within the 50 MHz band allocated for SDARS without causing harmful interference to one another. The applications thus are not mutually exclusive. The agreement of the SDARS applicants to share the allocated spectrum, and their acknowledgement that no harmful interference will result from this sharing, resolves these issues. It would be arbitrary and capricious for the Commission to do an end run around this statutory prohibition by manufacturing mutual exclusivity through a waiver of its cut-off rules. The pending applications, filed pursuant to a valid cut-off notice, are not mutually exclusive and must be licensed without resort to auctions.¹⁹

B. Auctions Will Delay, Not Expedite, Implementation of SDARS.

A number of commentators noted that using auctions would cause significant delays in the licensing process, thereby frustrating the very purpose for which auctions were devised. Because the current pool of applicants are not mutually exclusive, auctions can be used to license SDARS only if the proceeding is reopened and new mutually exclusive applications are accepted. This course of action would require the Commission to establish a new cut-off date, deferring action on the three to five-year-old pending applications until that time.

Auctioning SDARS spectrum would also ignore decades-old Commission policy favoring the use of technical and operational rules to avoid mutual exclusivity among satellite

¹⁸ 47 U.S.C. § 309(j)(1).

¹⁹ In addition, the Commission has held that broadcast spectrum is exempt from competitive bidding. Competitive Bidding for Licenses, 9 FCC Rcd 2348 (1994). Primosphere has proposed to operate solely as a broadcaster since its initial application was filed in December 1992.

applicants.²⁰ By ignoring this policy and applying its auction authority retroactively, the Commission would be using its auction authority improperly.²¹ The Commission may not take such action or make a radical change in long-standing policy without an articulated and well-founded justification²² Such a justification is nowhere to be found in the record developed thus far.

IV. BROADCASTERS HAVE FAILED TO DEMONSTRATE THAT SDARS WILL CAUSE HARM TO THE PUBLIC INTEREST.

We all remember being told that the onset of FM would be the death of AM and the onset of television would be the death of radio. And, now that the plethora of new technologies will be the death knell of local stations. My friends, the death knell for radio has sounded before — but, as you well know — radio has refused to answer that call. That is because of the creative genius of our radio operators. The ingenuity of our radio operators has forged even stronger relationships with the audience and as long as we provide the public with relevant programming, I predict America's love affair with radio will only be enhanced — Remarks of Eddie Fritts, President, National Association of Broadcasters, to "Radio 95" (September 7, 1995).

A. Broadcasters Have Failed to Meet the Standard Required to Demonstrate Harm to the Public Interest.

The Commission recognizes in the Notice that the burden of proving significant economic impact to terrestrial radio as the result of SDARS rests with terrestrial

²⁰ See Comments of DSBC at 45. See also 47 U.S.C. § 309(j).

²¹ See Comments of AMRC at 15.

²² See Comments of CD Radio at 36; Comments of Primosphere at 16.

broadcasters.²³ The Commission framed the inquiry into economic impact in very specific terms:

The economic impact of satellite DARS on existing radio broadcasters is relevant to this inquiry to the extent that such impact would *predictably* lead to *serious loss of important services to consumers*, taking into account the potential for future enhancements of terrestrial broadcasting by the introduction of new technologies and by appropriate changes in the Commission's rules for terrestrial broadcasting.²⁴

Thus, the relevant inquiry into economic impact has three elements:

- 1) Will there be a predictable (not merely speculative) economic impact on broadcasters?
- 2) If so, will this lead to a serious loss of important services to consumers?
- 3) Will this loss of services occur despite enhancements in terrestrial broadcasting?

These questions cannot be answered with mere speculation. The predictable impact the Commission is looking for cannot be based on fear and a misunderstanding of the capabilities of the relevant technology. Such groundless speculation does nothing to advance the Commission's effort to assess the potential impact of SDARS on terrestrial radio. Instead, hard economic data must be used to predict and assess the impact. Such data is now in the record, along with numerous other comments showing the tremendous public benefits to be

²³ Notice at ¶ 11.

²⁴ Id. (Emphasis added.)

gained by licensing SDARS. The record thus speaks clearly on all three elements of the analysis.

- 1) Although there will be a predictable economic impact on terrestrial broadcasters, this impact will be very small.
- 2) This impact will not lead to any serious impairment of important services to consumers. In fact, SDARS will bring many new services to the public and will spur terrestrial broadcasters to improve their current services.
- 3) Advances in terrestrial broadcasting will make terrestrial radio an even more formidable competitor to SDARS. These advances are likely to improve the overall health of broadcasting and bring many new and important services to the public.

B. The Economic Impact of SDARS Will Be Insignificant and Service to the Public by Terrestrial Radio Will Not be Adversely Affected.

Three separate economic analyses submitted by the SDARS applicants provide abundant support for the assertion that SDARS will have an insignificant impact on terrestrial broadcasting.²⁵ And in sharp contrast to the economic studies submitted by the NAB, the MTA/EMCI study provides quantitative projections of the growth and impact of SDARS based on analogous products and sound economic analysis.²⁶ This study shows that ten

²⁵ Darby, "Economic and Financial Aspects of U.S. Commercial Radio Broadcasting" (September 15, 1995) ("Darby Study", submitted as an attachment to the Comments of DSBC); Lilley, "Satellite Radio" (August 1994) (submitted as an attachment to the comments of CD Radio); Malarkey-Taylor Associates, Inc.-EMCI, "Satellite DARS Impact Study" (September 15, 1995) ("MTA/EMCI Study," submitted as an attachment to the Comments of AMRC and of Primosphere).

²⁶ The MTA/EMCI Study analyses the impact of SDARS on FM radio only. The study excludes AM radio from its analysis because the formats and high signal quality offered by SDARS are selling points that are not likely to attract the largely loyal AM listening audience. MTA/EMCI Study at 1. This analysis is consistent with that of Darby: "AM stations in small

years after SDARS is introduced there will be only a 1.28 percent reduction in terrestrial radio gross revenues industry-wide.²⁷ The study assumes that the growth of SDARS as a consumer product will be similar to that of Direct Broadcast Satellite Services. The study also assumes acceptance of SDARS services by both consumers and advertisers will be similar to that of niche channels operating on cable television.

A fact which seems to be lost on broadcasters is that, even with this impact, the terrestrial radio industry still will have billions of dollars in annual revenue. In addition, smaller markets — which are expected to feel the greatest impact of SDARS — are expected to experience a meager 0.53 percent drop in their net revenue and a 3.5 percent drop in operating profits when SDARS is fully mature.²⁸ Again, the vast majority of the market will remain unaffected by SDARS and there will still be a multi-billion dollar demand for the advertising services offered by terrestrial broadcasters. The broadcasters' claim that local radio will disappear, leaving this multi-billion dollar market untapped, is preposterous.

The opponents of SDARS have failed to supply anything comparable to this study. Instead, every single analysis submitted in opposition of SDARS assumes that terrestrial radio will suffer a 10 percent loss of revenue without ever explaining why or how that

market [sic.] and some other large segments of current 'local' or 'public' programming will not be impacted at all by DARS." Darby Study at 26.

²⁷ MTA/EMCI Study at Table 1.9. Primosphere emphasizes that these estimates are based on assumptions that emphasize the impact SDARS will have on terrestrial radio. For instance, the study does not take into account the fact that broadcasters are likely to increase their competitiveness by moving towards terrestrial DARS and making changes in programming. In addition, the study assumes that SDARS will be phenomenally successful and will quickly gain widespread acceptance among consumers.

²⁸ MTA/EMCI Study at Tables 1.6 and 1.7.

number was chosen. These conclusory, self-serving studies provide no basis for limiting SDARS and should be rejected as pure speculation.

C. The NAB Studies Are Based on a Misunderstanding of SDARS.

1. The economic studies submitted by the NAB do not contain the quantitative analysis requested in the Notice.

Although the NAB has submitted an impressive battery of studies extolling the benefits of local radio, not a single piece of paper in its voluminous submissions deals with the heart of the issue before the Commission: **What is the *probable* impact of SDARS on local radio.** Instead, the NAB has submitted study after study that is based on the conclusions it purports to prove. Each study assumes a given scenario, usually with SDARS swallowing 10 percent of the industry's annual revenues, but none explains the basis for assuming such staggering success for SDARS. The studies universally ignore the temporal component of the analysis and assume that SDARS will achieve an incredible 10 percent market share overnight, despite the fact that not a single SDARS satellite or receiver has yet been built. No one disputes the fact that a 10 percent loss of revenue will hurt any business. Such an analysis is totally irrelevant, however, because broadcasters have provided no basis for assuming that a 10 percent loss in revenue will occur. Finally, contrary to the express instructions of the NPRM, none of the studies submitted by the NAB takes into account the effect future enhancements in terrestrial broadcasting will have on its ability to compete with SDARS.

The NAB has tried to distract the Commission by playing the "small-town public interest" card — a card that is irrelevant to the present rulemaking. No one doubts the benefits local broadcasting brings to the public. But that is simply not the issue. What is at

issue is whether licensing SDARS will have a significant negative impact on local broadcasting. The NAB's studies provide no guidance with regard to this inquiry.

The economic analysis submitted by the NAB consists of four studies that each provide a piece of "evidence" that leads to the NAB's conclusion that SDARS will have a devastating impact on local broadcasting. Each of the studies, however, is seriously flawed and provides little help in understanding the potential impact of SDARS. None of the studies even attempts the type of hard economic analysis that is presented in the MTA/EMCI study.

2. Whether terrestrial broadcasters currently serve the public interest is irrelevant to the determination of the likely impact of SDARS on terrestrial radio.

The first study submitted by the NAB purporting to assess the impact of SDARS on terrestrial radio is a study entitled Local Perspectives on Localism in Broadcasting and the Adverse Impact of Satellite DARS. This study provides no information regarding the likelihood that SDARS will have a significant impact on terrestrial radio and is nothing more than a catalog of the unsubstantiated fears of people who do not understand SDARS. The examples cited in the report of public services performed by broadcasters in rural communities are noteworthy, but irrelevant for determining that impact.

The interviews with local broadcasters and community figures contained in the study reveal that the people with whom the NAB spoke had a fundamental misunderstanding of SDARS. The interviewees all assumed either that SDARS would instantly result in a 10 percent decrease in revenues or, alternatively, assumed that SDARS would be the equivalent of dropping 40 superstations into the local market.²⁹ The comments seem to reflect a belief

²⁹ See Haring and Shooshan, "Local Perspectives on Localism in Broadcasting and the Adverse Impact of Satellite DARS" (submitted as an attachment to the Comments of the NAB) at 57-59, 71-75, 91-94, 108-112, 125-128, 137-139.

on the part of those quoted that SDARS was an FM service that could be received over conventional radios. These comments do not reflect an understanding that a special, as yet unavailable, receiver must be used for SDARS, that the service will not reach the market for at least four years, and that significant market penetration will not be achieved for eight to ten years. The "study" says nothing about whether a loss of revenue to broadcasters will occur as a result of SDARS.

3. NAB's attempt to estimate audience diversion is fatally flawed. _____

The NAB submits a study prepared by its Research and Planning Department that attempts to estimate the extent to which SDARS will divert listeners from terrestrial radio. This study attempts to give a quantitative projection of the impact of SDARS on terrestrial radio. It is so seriously flawed, however, that it is of no value to this inquiry.

The NAB's audience diversion study is based on a survey of 1000 individuals who were asked about their potential acceptance of SDARS services. The study describes the question which was posed to the persons surveyed and then provides the responses to that question. After posing several questions regarding general interest in SDARS-services and willingness to pay for such services, the study moves on to the crucial issue of how much less the respondents would listen to terrestrial radio if SDARS was available.

The analysis of the extent to which listening would decline begins with the statement that "20% of the sample said they would listen to less radio if they had CD-quality satellite radio service." The study then goes on to state that "*[f]or those indicating they would listen to less radio . . . a further question was posed — how much less . . . ?*" Instead of providing the expected answer to this question: how much radio would this 20 percent sample listen to, the study goes on to state that the resulting answer, 11.6 percent, is "an

overall figure including all respondents, not just those who indicated they would listen less to radio with DARS." This perplexing conclusion is not explained in the study, and does not make sense. Nowhere in the study does the NAB reveal what the response to this question was. Is the NAB claiming that even those who do not listen to SDARS will nonetheless listen to less radio once SDARS is available? For overall listening to decrease by 11.6 percent when only 20 percent of those surveyed said they would listen to less radio, that 20 percent would have to reduce their radio listening by 60 percent! The statistics shown by the NAB give no indication of such a drastic decline.

In fact, the NAB's assertions regarding the percentage reduction in listening would only make sense in this context if viewed as reflecting the reduction only among the 20 percent who would listen to radio less. In that case, if 20 percent of radio listeners would listen to 11.6 percent less radio, the overall decline in radio listening is 11.6 percent of 20 percent, or a **2.3 percent** decline overall. This figure is consistent with the projections contained in the MTA/EMCI study.³⁰ Thus, this NAB analysis cannot be relied on as a gauge for the potential impact of SDARS.

³⁰ MTA/EMCI study at Table 1.2.

4. The NAB's estimates of revenue diversion
are seriously flawed and inaccurate.

Yet another study was prepared for the NAB by Paul Kagan Associates (the Kagan study). The Kagan study analyzes two scenarios which are based on the theory of "market fragmentation." The first scenario analyzes the impact on high-, mid- and low-rated stations of a five percent, 10 percent and 15 percent decrease in revenues. This analysis arrives at the predictable conclusion that such drops would cause hardship for all stations, but it fails to address one crucial issue: *Will such a decrease in revenues occur with the introduction of SDARS?* Without addressing whether SDARS will actually cause a drop in revenues, analyzing the effect of a drop in revenues on various stations is merely an academic exercise.

The next scenario presented in the study attempts to address the missing causation issue by basing its revenue loss assumptions on Primosphere's estimation that it will capture 10 percent of the national advertising revenues in 10 years.³¹ The Kagan study rejects explicitly Primosphere's prediction that much of the revenue it garners will come from new advertising sources.³² In fact the Kagan study notes, "[w]e believe just the opposite — namely that Primosphere's prime source of advertising revenue will come from fragmenting the existing national revenue base of the local radio industry."³³ The Kagan study provides no basis for this belief.

³¹ Indeed, given the Commission's recognition on (notice para. 16) that 17% of all radio advertising revenue comes from national sources, 10% of this figure yield a reduction in advertiser revenues of 1.7% - very close to the 1.2% reduction projected in the MTA/EMCI study.

³² This assumption was included in the MTA/EMCI study at p.6.

³³ Kagan study at 18.

In basing its predictions on the assumption that SDARS will derive most of its revenues from existing advertising sources, the Kagan study ignores without explanation clear historical precedent and prior Commission findings. As Primosphere pointed out in its initial comments, its niche market focus will enable it to attract advertisers that have not previously used radio, much the same way that CNN, MTV and ESPN have been able to attract new advertising to television. The study's failure to even recognize such notable examples of new services bringing in new advertisers to the market calls the study's assumptions into question. In addition, the Commission has previously stated its belief that new entrants to a market tend to draw new advertising in explaining its reasoning for overturning the Carroll doctrine:³⁴

The court's reasoning in Carroll was based on the assumption that a new station will compete against an existing station for the same advertisers, and as a result, revenue to each station would decrease, thereby injuring or destroying its ability to provide adequate service to the public. We questioned the validity of this premise, and determined that, while there is not an infinite amount of advertising revenue available in a market, the total amount of revenue is likely to increase when additional stations enter a market because they tend to seek out new sources of advertising. *Because the new station may obtain much of its revenue from new advertising sources rather than from existing advertisers, the addition of a new station might well result in the same or improved service to the public by local broadcasters.*³⁵

³⁴ Interestingly enough, this policy was articulated in response to yet another occasion where the NAB argued that local broadcasters needed economic protection in order to survive competition.

³⁵ In the Matter of Policies Regarding Detrimental Effects of Proposed New Broadcasting Stations on Existing Stations, 66 R.R.2d 19 (1989).

If the Commission was willing to recognize the tendency of *other local terrestrial broadcasters* to attract new sources of advertising, it should certainly be reasonable to conclude that SDARS — a purely national service — is capable of the same feat.

The Kagan study focuses its inquiry on the effect on a station's cash flow that would result from a 10 percent loss in revenues. Rather than creating an economic model and estimating future revenues and cash flows, the study instead uses a "historic cash flow margin" to estimate losses in cash flow. According to the Kagan study, by multiplying the percentage decrease in revenue by the historic rate at which stations convert revenue into cash flow, the potential loss in cash flow can be determined.

This approach is not only vastly inferior to the use of realistic financial models, such as those contained in the MTA/EMCI study, this arithmetic approach glosses over factors that determine actual cash flow. The Kagan study also incorrectly assumes that broadcasters will make no adjustments to address the additional competition from SDARS.

V. THE RECORD EVIDENCE SUPPORTS ADOPTION OF MINIMUM LICENSING AND SERVICE RULES.

The argument of terrestrial broadcasters that SDARS should be licensed with restrictive service rules is based on the premise that SDARS poses a threat to the economic viability of terrestrial radio. As Primosphere has shown, such allegations are nothing more than unsubstantiated conjecture. There is no reason to impose any service rules on SDARS that would limit its impact on terrestrial broadcasting. The impact will be minimal. In addition, the single most potent competitive limitation on SDARS is already in place: *There are no SDARS receivers in existence and the public does not have an inkling that the service exists.* SDARS must overcome significant obstacles simply to survive as a viable

service. Receiver production and consumer education will place substantial limitations on the growth of SDARS.³⁶

A. The Commission Should Allow SDARS Providers to Operate on Either a Subscription or Advertiser-Supported Basis.

Any restriction on the way in which SDARS is delivered to the public can only be justified by a need to protect terrestrial broadcasting. As the economic data submitted to the Commission show, the impact on broadcasting will be minimal. In addition, as the Commission recognized in its review of the Carroll doctrine with regard to competing terrestrial stations, it is likely that the new competition from SDARS is likely to result in an overall increase in service to the public.

The assertion made by the NAB that requiring SDARS to operate only as a subscription service would "provide an economic framework" in which to deliver niche marketing is yet another blatant attempt by the NAB to stifle competition and protect its members' market share. There is no reason to believe that a subscription service would make niche programming any easier to deliver or more available to its intended audience than an advertiser supported format. In fact, it makes sense that a free, over the air, advertiser supported format would make these formats more, not less, accessible to their intended audiences. The assertion that these minority and niche audiences should be forced to pay for service that the rest of the public receives for free is outrageously arrogant and elitist.³⁷

³⁶ See Carlin, "Estimating the Impact of Satellite Digital Audio Radio Service On the Existing Radio Market by Product Analogy and Consumer Demand Analysis," at 15 (submitted as an exhibit to Comments of the National Association of Broadcasters).

³⁷ See Comments of the New Jersey Broadcasters' Association at 1 (stating that "[i]f consumers want DARS, then they should be willing to pay for it."). Such a statement calls into question the broadcasters' devotion to the public interest. Evidently, the New Jersey

B. The Commission Should Allow Spectrum Aggregation.

In its comments, CD Radio proposes rules that would prevent SDARS licensees from combining spectrum into a single entity and thus obtaining a significant number of channels more than their competitors.³⁸ The logic behind this proposed rule is that it will promote competition among SDARS providers by ensuring that no one provider obtains a disproportionate amount of spectrum and thus significantly more channels than the other providers.

Primosphere disagrees with this analysis and CD Radio's proposed rule because it may not prevent the situation CD Radio seeks to avoid and may actually hinder innovations in technology and services.

Primosphere believes that there may be two significant benefits from the additional spectrum that aggregation (should it occur) would provide. First, the more spectrum available to an individual SDARS licensee, the greater the likelihood of varied programming formats. This proposition is almost intuitive. No matter how popular one format, with enough channels there is sure to be room for others.

Second, with more spectrum it is possible to increase channel size and bit rates and, therefore, for selected services, significantly improve audio greatly. A greater number of program formats and higher audio quality is the great promise of SDARS. Primosphere believes that the Commission should not at this early juncture impose restrictions that might limit this promise in the future. As SDARS evolves in response to market demand, it is essential to have regulatory flexibility.

Broadcasters believe the public should receive free, high-quality, over the air service only if terrestrial broadcasters profit from it.

³⁸ Comments of CD Radio at 18.

VI. THE RECORD EVIDENCE SUPPORTS ADOPTION OF MINIMAL TECHNICAL RULES.

A. The Comments Support Adoption of Minimal Technical Rules.

Comments submitted by numerous parties support the adoption of minimal technical rules for SDARS. In addition to the comments of the four applicants, comments submitted by satellite manufacturers, radio manufacturers and other industry segments all suggest that only the most minimal technical rules would be appropriate for SDARS. Instead, the Commission should allow industry-developed standards to evolve.³⁹

In their comments in response to the NPRM, both Ford Motor Company (Ford) and the Consumer Electronics Group of the Electronic Industries Association (CEG/EIA) enthusiastically support satellite DARS and recommend industry-developed transmission and receiver standard. The CEG/EIA further notes the successes of industry standard based new services, such as TV stereo audio, and the failures of new services launched without industry developed standards, such as AM stereo.

Ford Motor Company supports the introduction of satellite DARS and emphasizes the importance of adequate link margins for a service involving mobile reception.⁴⁰ In addition, Ford supports the adoption of a single, open standard for SDARS which it believes "will keep receiver costs down, minimize complexity, and encourage competition in the marketing of receivers." Primosphere agrees with Ford that "a single, open standard will greatly facilitate the likelihood of consumer acceptance of the service" and that the "transmission and reception standard should be non-proprietary (e.g., not patented) and its

³⁹ See, e.g. Comments of Consumer Electronics Group of the Electronic Industries Association at 7-9; Comments of Ford Motor Company at 3; Comments of AMRC at 20; Comments of Satellite CD Radio at 91-92; Comments of DSBC at 48; Comments of Primosphere at 40.

⁴⁰ Ford Comments, at p. 2.